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No. 99-

In The Supreme Court of the United States

American Telephone & Telegraph Co.,
Petitioner,

v.

Security Watch, Inc., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in this immediate appeal brought pursuant to 9 U.S.C. § 16(a)(3), the court of appeals properly overturned the district court's order dismissing this case in favor of arbitration.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no corporate parent or affiliate that is publicly owned. Petitioner further states that Lucent Technologies, Inc., a publicly held corporation spun off by petitioner, has a financial interest in the outcome of this proceeding.

PARTIES

In addition to the parties listed in the caption of the case, co-defendant Sentinel Systems, Inc. ("Sentinel"), which prevailed before the court of appeals, appears as a nominal respondent in this Court pursuant to this Court's Rule 12.6.

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No. 99-

AMERICAN TELEPHONE & TELEGRAPH CO.,
Petitioner,

v.

SECURITY WATCH, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court to grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is published at 176 F.3d 369 (6th Cir. 1999) and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The court's order denying rehearing can be found at Pet. App. 24a. The unpublished order of the district court granting petitioner's motion to dismiss is reproduced at Pet. App. 15a-23a.

JURISDICTION

The court of appeals entered judgment on May 11, 1999, and denied a timely petition for rehearing and sug-

gestion for rehearing *en banc* on July 22, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 16, provides appellate jurisdiction to entertain appeals from several types of court orders relating to arbitration. Included among this category of immediately appealable orders is "a final decision with respect to an arbitration that is subject to [the FAA]." *Id.* § 16(a)(3).

STATEMENT OF THE CASE

Statutory Background

This case involves the proper construction of the 1988 amendments to the FAA, 9 U.S.C. § 16. Prior to those amendments, the appealability of orders relating to arbitration was determined pursuant to the general statutes governing appellate jurisdiction, *e.g.*, 28 U.S.C. §§ 1291, 1292. See *Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 782-83 (7th Cir. 1992). With the 1988 amendments, however, Congress enacted a special set of rules governing appealability in the arbitration context. These rules "endeavored to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration." *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993).

Consistent with Congress' purpose of encouraging arbitration as a cheaper, more efficient alternative to litigation, the statute denies appellate jurisdiction over orders favoring arbitration and grants jurisdiction to hear appeals from anti-arbitration orders. Specifically, the FAA allows appeals from orders "refusing a stay of any action [pending arbitration]" (9 U.S.C. § 16(a)(1)(A)), denying an

application "to order arbitration to proceed" (*id.* § 16(a)(1)(B)) or "to compel arbitration" (*id.* § 16(a)(1)(C)), "denying confirmation of an [arbitrator's] award or partial award" (*id.* § 16(a)(1)(D)), or "modifying, correcting, or vacating an award." *Id.* § 16(a)(1)(E). In the same vein, the FAA authorizes review of "an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to [the FAA]." *Id.* § 16(a)(2).

At the same time, Congress precluded "interlocutory" appeals from pro-arbitration orders. *Id.* § 16(b). Among these are orders "granting a stay of any action" pending arbitration (*id.* § 16(b)(1)), "directing arbitration to proceed" (*id.* § 16(b)(2)), "compelling arbitration" (*id.* § 16(b)(3)), or "refusing to enjoin an arbitration that is subject to [the FAA]." *Id.* § 16(b)(4). Because these orders favor arbitration, they may not be appealed, as of right, on an interlocutory basis but rather must await final decision by the district court terminating the controversy following the completion of arbitration. See *id.* § 16(b) (absent utilization of the double-discretionary avenue of interlocutory appeal pursuant to 28 U.S.C. § 1292(b), "an appeal may not be taken from an interlocutory order [of the type set forth in section 16(b)]"); see also *id.* § 16(a)(3) (authorizing appeals from any "final decision with respect to an arbitration that is subject to [the FAA]").

Factual Background

This case involves security systems manufactured by petitioner American Telephone and Telegraph Company ("AT&T"). These systems are sold by AT&T to distributors nationwide, such as respondent Sentinel Systems, Inc. ("Sentinel"), and resold to dealers. Sentinel served as a

dealer of AT&T security systems from at least 1988 through 1994 pursuant to annual dealer agreements between respondent Security Watch, Inc. ("Security") and Sentinel.

The pre-1994 Agreements, like all of the other dealership agreements, included a forum-selection clause that required the parties to litigate any disputes arising out of those agreements in certain state or federal courts in Virginia. In the 1994 Agreement, however, the parties agreed to subject all disputes under $1 million to Alternate Dispute Resolution ("ADR"), including arbitration as the final step. Pet. App. 18a. Where more than $1 million is at stake, however, the parties and AT&T had the option of litigating the dispute "in a court of competent jurisdiction in New Jersey" in lieu of arbitration. *Id.* at 19a. The 1994 Agreement specifically provided that all terms contained therein—including the arbitration clause—superseded all written understandings between the parties "concerning the subject matter of this Agreement." *Id.* (quoting 1994 Agmt. § 19).

In 1996, Security filed suit against AT&T and Sentinel alleging that certain systems sold to Security were defective. The district court dismissed the complaint. The court ruled (1) that the "clear and unambiguous" forum selection clause precluded the litigation of any of plaintiff's claims against Sentinel in Tennessee; and (2) that the ADR provisions covered all disputes against Sentinel or AT&T arising after execution of the 1994 Agreement, including all disputes pled in the lawsuit. Pet. App. 16a.

Though not subject to that clause, the district court likewise found all of Security's claims against AT&T (*i.e.*, 1994 and pre-1994 claims) to be legally barred in federal court by the dispute resolution clauses of the 1994 Agreement. The court held that the contracts "establish

in great detail a distributor-dealer relationship" (Pet. App. 21a) and that "the subject matter of this Agreement" referred to in the relevant clause "encompasses the entire distributor-dealer relationship." *Id.* In effect, the court held that the parties must have intended to use ADR to resolve all disputes arising after the execution of the 1994 Agreement, regardless of whether the dispute might arguably have arisen under a prior contract. The court held specifically: "The pre-1994 contracts between those two parties, being written understandings, are superseded by the terms of the 1994 contract, and its requirements that the parties follow certain enumerated dispute resolution processes, including certain arbitration provisions." *Id.* at 22a.

The court rejected Security's fall-back argument that it need not arbitrate its claims because more than $1 million is at stake—a naked assertion given the fact, noted by the district court, that the complaint "does not seek an enumerated amount of damages." Pet. App. 22a. In doing so, the court relied on precedent holding that "the issue of the size of the claim [i]s itself arbitrable." *Id.* at 22a n.2. The court alternatively noted that even if Security's fall-back argument were correct, the proper forum for this suit would be "in New Jersey." *Id.* Accordingly, the court "dismisse[d], rather than stay[ed], the action." *Id.*

Decision Of The Court Of Appeals

Even though Congress specifically amended the FAA in 1988 to "limit appeals from orders directing arbitration," *Filanto, S.p.A.*, 984 F.2d at 60, Security appealed the district court's conclusion that the arbitration clause applied to Security's claims. The panel ruled that the decision below was immediately appealable and thus upheld

its jurisdiction over the merits pursuant to 9 U.S.C. § 16 (a)(3). Pet. App. 5a.

Although the jurisdictional issue consumed dozens of pages in the parties' briefs in the court of appeals, the panel disposed of that important threshold issue in one page. The panel deemed itself bound to accept jurisdiction under *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1275-76 (6th Cir. 1990), which, in its view, "held that an order dismissing an action in favor of arbitration is a final order appealable under § 16(a)(3)." Pet. App. 4a. On the continuing authority of *Arnold*, the panel declined to follow the plethora of intervening cases from other Circuits ruling that orders favoring arbitration—including outright dismissals—are not immediately appealable pursuant to section 16(a)(3) in cases where, as here, the plaintiff has sought relief beyond a mere determination concerning arbitrability.[1]

After concluding that *Arnold* renders appealable any "order dismissing an action in favor of arbitration" (Pet. App. 4a), the panel then contradicted itself by ruling that "it cannot be said that this action was disposed of in favor of arbitration." *Id.* The court reached this amazing conclusion even though it was constrained to admit that the district court "based its dismissal" on "the ADR Clause of the 1994 Agreement," which "requires

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[1] See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998); *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998); *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212-13 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994); *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir 1993).

the parties to enter into binding arbitration" for claims seeking less than $1 million. *Id.*

The only justification the panel gave for ruling, in effect, that a dismissal predicated on an arbitration clause is not a disposition in favor of arbitration was that "the district court did not determine the amount in controversy and thus did not determine whether arbitration would be required." Pet. App. 4a. The panel did not reconcile that conclusion with the fact that the district court specifically noted that "the issue of the size of the claim [*i*]*s itself arbitrable.*" *Id.* at 22a n.2 (emphasis added). Instead, the panel simply stated that "§ 16(b) is not applicable to this appeal" and that it possessed jurisdiction to decide the appeal. *Id.*

On the merits, the panel disagreed with the district court's conclusion that the 1994 Agreement containing the arbitration clause superseded prior agreements between the parties. Pet. App. 7a. The panel shrugged off as mere "boilerplate" (*id.*) the provision of the 1994 Agreement stating that the Agreement "supersede[s] all prior oral or written understandings between the parties." 1994 Agmt. § 19. With this reasoning, the panel ruled that "Security will be permitted to proceed against AT&T in the Western District of Tennessee on its pre-1994 claims." Pet. App. 2a. The panel did, however, agree with the district court that the forum-selection clause precludes suit against Sentinel outside of the contractually designated Virginia courts. *Id.*

Petitioner moved for rehearing with a suggestion that the case be reheard *en banc* to reconsider *Arnold* in light of intervening developments from other Circuits. After calling for a response from Security Watch, the court of appeals denied reconsideration. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

Further review is necessary to ensure the proper resolution of a question of exceptional importance that has badly divided the courts of appeals. That question is whether, under the FAA, 9 U.S.C. § 16(a)(3), a court of appeals has jurisdiction to hear an immediate appeal from a district court order dismissing a case in the belief that it presents matters that should have been submitted to arbitration. Most Circuits correctly look to the nature of the underlying proceeding to determine appealability under section 16(a)(3), concluding that an immediate appeal is allowed only when a determination of arbitrability was the sole relief sought at the trial level, for it is only in that circumstance that the dismissal is truly "final" under section 16(a)(3). See n.1, *supra.*

The Sixth Circuit, however, adheres to a formalistic minority view under which it is the *label* of the district court's disposition that is controlling. On this view, if a district court finds that a dispute is arbitrable but fails expressly to order arbitration or grant a stay pending arbitration, an immediate appeal lies, but no appeal may be taken if the district court backs up its finding with such an order or stay. Two other Circuits have adopted this minority approach. See *Randolph* v. *Green Tree Fin. Corp.*, 178 F.3d 1149, 1152-56 (11th Cir. 1999); *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995).

In addition to elevating form over substance, the minority approach undermines the stated purpose of the FAA to suspend the appellate process and to require immediate arbitration when, in the district court's view, claims asserted in a lawsuit are arbitrable. This Court should grant certiorari and adopt the clear majority view in the Circuits that dismissals in favor of arbitration are not appeal-

able where, as here, relief was sought in the district court beyond a mere determination of the arbitrability of a controversy. Any other result would be inconsistent with the strong federal policy favoring arbitration and the traditional definition of "finality," and would produce an absurd result that Congress simply did not intend when it enacted 9 U.S.C. § 16.

Even if the court of appeals had jurisdiction, the panel's decision as to the scope of the parties' arbitration agreement conflicts with decisions of this Court. The panel reasoned that, despite the *federal* interpretive rule that all doubts should be resolved in favor of arbitration (see, *e.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)), the parties' agreement to arbitrate should not be deemed applicable to contracts predating that agreement because of the *state* common law maxim that ambiguities in a contract generally should be construed against the drafter. Pet. App. 10a. It is hornbook constitutional law, however, that federal law trumps any conflicting state law. See U.S. Const. art. VI, cl. 2 (Supremacy Clause). The petition for certiorari, therefore, should be granted.

I. WITH ALMOST ALL OF THE CIRCUITS HAVING WEIGHED IN ON THE SUBJECT, THE QUESTION OF THE APPEALABILITY OF DISMISSALS IN FAVOR OF ARBITRATION REMAINS A MATTER OF DISPUTE.

In this case, the Sixth Circuit adhered to its prior decision holding that orders dismissing an action in favor of arbitration are immediately appealable. Pet. App. 5a (following *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1275-76 (6th Cir. 1990)). This view, while adopted in the interim by two other Circuits, has been expressly rejected by eight other Circuits that have addressed the appeal-

ability of such orders since *Arnold*. This presents a square and widely acknowledged split of authority on a jurisdictional question that calls for a uniform, bright-line rule. Given the persistence of this decisional conflict and the number of Circuits that have already weighed in on this question, petitioner respectfully submits that the time has come for this Court to provide an authoritative answer on the proper interpretation of section 16(a)(3).

a. *Arnold* was apparently the first appellate decision confronting the 1988 amendments to the FAA. In that case, the Sixth Circuit ruled that an order dismissing all of the claims asserted in a securities fraud action and compelling arbitration was a "final decision" reviewable under section 16(a)(3). *Arnold*, 920 F.2d at 1276. In reaching that result, the court did not reconcile its approach with the text of the statute. Instead, the court gave "dispositive" effect to a snippet from the legislative history opining that dismissals in favor of arbitration are appealable on an interlocutory basis. *Id.* at 1274. In the decision below, the Sixth Circuit panel adhered to the *Arnold* decision, despite its patent analytical flaws and near-universal rejection by other Circuits (Pet. App. 4a), and the *en banc* court refused to reconsider *Arnold* (*id.* at 24a).

Arnold stood as an outlier until recently, when two Circuits followed the Sixth Circuit's lead. See *Randolph* v. *Green Tree Fin. Corp.*, 178 F.3d 1149, 1152-56 (11th Cir. 1999); *Armijo* v. *Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995). These courts have ruled, incorrectly, that orders dismissing cases in favor of arbitration are *per se* appealable under section 16(a)(3). See *Randolph*, 178 F.3d at 1156 (holding that "where the district court effectively disposes of all other issues by issuing an order compelling arbitration and dismissing the remaining claims with prejudice, we have appellate juris-

diction over the case"); *Armijo*, 72 F.3d at 797 (finding appellate jurisdiction where the claims raised in the complaint were deemed arbitrable and thus dismissed with prejudice). This widening of the conflict among the Circuits strongly supports certiorari here.

b. These courts' approach to appellate jurisdiction over dismissals in favor of arbitration has largely been overtaken by developments in other Circuits. Since the *Arnold* decision was rendered back in 1990, at least *eight* Circuits have rejected the analysis employed—and the result reached—in *Arnold*. See n.1, *supra* (citing cases).

As a "clear majority" of the Circuits have recognized, in allowing appeals from "final" decisions "Congress simply 'built upon the distinction the courts had previously recognized between so-called 'independent' proceedings and so-called 'embedded' proceedings.'" *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994) (citing cases). "Independent proceedings have been defined as those in which 'the only issue before the court is the dispute's arbitrability' while embedded proceedings are, in short, all other proceedings in which the question of arbitration arises." *Id.* (quoting *McDermott Int'l, Inc.* v. *Underwriters at Lloyds*, 981 F.2d 744, 747 (5th Cir. 1993)).

This distinction is the "jurisdictional lodestar of appealability." *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998). This is because the distinction determines whether an order is truly "final" (and thus potentially appealable under section 16(a)(3)) or merely "interlocutory" or nonfinal (and thus potentially subject to section 16(b)'s express preclusions against review). As a result, the prevailing rule in Circuits other than the Sixth, Tenth,

and Eleventh is that "an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review, even when all the claims in which the arbitration issue is embedded are resolved." *Humphrey* v. *Prudential Secs., Inc.*, 4 F.3d 313, 318 (4th Cir. 1993); see also, *e.g., Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("An order involving an embedded proceeding is always an interlocutory order."); *Gammaro*, 15 F.3d at 96 (same). Of course, this does not mean that review of an order favoring arbitration in an embedded proceeding is not precluded altogether; instead, review is merely "postpon[ed] . . . until the arbitration proceeding has run its course," fulfilling Congress' goal of favoring arbitration in lieu of litigation. *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1245 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998).

Courts on both sides of the debate acknowledge that a square Circuit split exists on the appealability of dismissals in favor of arbitration. For example, after surveying the decisional landscape, the Eleventh Circuit in *Randolph* stated: "We are thus faced with a circuit split on the question." 178 F.3d at 1149. The court then flatly rejected the majority view and adopted the minority view followed by the Sixth Circuit. See *id.* at 1155 ("Only if we followed the other circuits (save the Sixth and Tenth) and attached excessive significance to the 'embedded' versus 'independent' distinction . . . would we lack jurisdiction here. That we decline to do."); but see, *e.g., Perera* v. *Siegel Trading Co.*, 951 F.2d 780, 784 (7th Cir. 1992) ("Many courts of appeals have concluded that arbitration orders in embedded proceedings constitute interlocutory and not final decisions. Nevertheless, as can be seen by the *Arnold* decision, there is not complete agreement on this issue.") (citation omitted).

Under the majority view, it is unquestionable that the panel in this case lacked subject-matter jurisdiction to hear Security Watch's appeal in advance of arbitration. It is *undisputed* that the proceeding below was an "embedded" one, for the arbitrability issue was raised as a defense to Security's claims on the merits. See, *e.g.*, *Gammaro*, 15 F.3d at 95. Moreover, it cannot seriously be disputed that the dismissal below was entered in the belief that the controversy between the parties was covered by the arbitration clause of the 1994 Agreement. Indeed, the panel itself admitted that "the district court based its dismissal of Security's action, in part, on the preclusion of the Tennessee forum by the ADR Clause of the 1994 Agreement."[2] This is *precisely* the kind of order that Congress did not want appellate courts second-guessing on an interlocutory basis, as the panel did here.

c. Given that *Arnold* has become more than just as an outlier among an otherwise uniform body of Circuit law, this Court should grant certiorari and decide once and for all whether orders dismissing court actions in favor of arbitration are immediately appealable. This question is of considerable importance to the integrity of

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[2] The panel suggested that arbitration might not have been required, even on the district court's view, because the 1994 Agreement permits the filing of a lawsuit in lieu of arbitration for claims involving more than $1 million. Pet. App. 4a. This fallback rationale suffers from two glaring flaws. *First*, as noted by the district court, the Complaint "does not seek an enumerated amount of damages" (*id.* at 22a), which makes it impossible to say, at this early juncture, that Security Watch's claim exceeds $1 million. *Second*, the panel's speculation is refuted by the district court's *express statement* that "the issue of the size of the claim [i]s itself arbitrable." *Id.* at 22a & n.2 (citing precedent). This shows that, *regardless* of the potential size of Security's claims, the district court viewed arbitration as an essential prerequisite to refiling a court case, either to resolve the underlying dispute or the related dispute over the size of the claim (subject, under the 1994 Agreement, to eventual review in the New Jersey courts).

the judicial review scheme enacted by Congress in 1988 as an amendment to the FAA. See 9 U.S.C. § 16.

All agree that the purpose of the 1988 amendments was to suspend the appellate process—and allow arbitration to proceed without further delay—whenever the district court determines that arbitration is required. The approach adopted in *Arnold* and its progeny frustrates that salutary legislative purpose by giving appellate courts *carte blanche* to second-guess, *in advance of arbitration*, district court determinations that arbitration is required. This will occur whenever the district court happens to omit the formality of entering an order specifically compelling arbitration or staying further proceedings pending arbitration.

Absent corrective action by this Court, the legislative policy behind the 1988 amendments will be frustrated. Arbitration will be inordinately delayed while parties whose claims are dismissed because they should have been submitted to arbitration take appeals instead of honoring their agreements to arbitrate. This result is flatly inconsistent with the strong federal policy favoring arbitration over litigation.

Equally important, the Sixth Circuit's approach produces absurd results that Congress could not have intended. As one court of appeals explained in rejecting that approach:

> [D]istinguishing between stays and dismissals for purposes of appellate review would condition the result upon the district court's decision. If circumstances compelled the court to stay the action, the case would proceed to an arbitrator; if the court dismissed all claims the case could be appealed immediately. We do not believe that Congress intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration. We

> interpret the bar on appellate review to be just that, regardless of the terminology used by the trial court.

McCarthy, 122 F.3d at 1245. In other words, in the Sixth Circuit, two fundamentally inconsistent results can obtain for appealability purposes between the *same* parties, and involving the *same* claims and the *same* arbitration agreement, depending on the terminology used by the district court. This illogical state of affairs—which has correctly been rejected by eight other Circuits—calls for this Court's intervention at this time, both to bring needed uniformity on this jurisdictional question and to vindicate the pro-arbitration policy of the FAA.

II. THE SIXTH CIRCUIT DECISION CONCERNING THE ARBITRABILITY OF RESPONDENT'S CLAIMS CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT.

Even assuming the panel had jurisdiction to reach the merits in advance of arbitration, it resolved the arbitrability question in a manner that conflicts with controlling decisions of this Court. Although the panel strained for a basis to end-run the parties' agreement to arbitrate, established law required the court of appeals to strain in the *opposite* direction—*i.e.*, in *favor* of arbitration. "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); see also, *e.g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995) (holding that "when the parties have a contract that provides for arbitration of some issues," the law "insist[s] upon clarity before concluding

that the parties did *not* want to arbitrate a related matter").

The contrary ruling below turns both common sense and the presumption in favor of arbitration on their heads. When parties in a continuing relationship agree to a new dispute resolution procedure, as a matter of common sense, one would naturally expect that provision to apply to all future disputes, regardless of origin, unless the parties explicitly excepted certain types of disputes. But, this common sense notion is also fully supported by the strong federal presumption for resolving ambiguities in favor of arbitration. Under *Kaplan* and its antecedents from this Court, the critical inquiry is not why certain admittedly related disputes would be *included* within the parties' agreement to arbitration, but rather why such disputes would be *excluded*. 514 U.S. at 945. Having asked the wrong question—that is, why the parties would have included pre-1994 claims within the arbitration clause (Pet. App. 9a)—it comes as no surprise that the court of appeals gave the wrong answer to this important question.

The court below compounded its error in this regard in two respects. *First*, it purported to limit the rule that doubts are to be resolved in favor of arbitration to the interpretation of arbitration clauses themselves. Pet. App. 6a-7a. This is contrary to settled law, which makes clear that the rule applies not just to the interpretation of arbitration clauses, but rather to *any* interpretive question that impacts "the scope of arbitrable issues." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The question here about whether the merger clause in the 1994 Agreement—which the panel inexplicably dismissed as mere "boilerplate" (Pet. App. 7a)—surely affects the scope of arbitrable issues because it determines whether pre-1994 disputes are subject to the arbitration clause.

Second, the panel avoided the *Moses H. Cone Memorial Hospital* rule by invoking the state law "maxim that contract ambiguities are to be construed against the drafter." Pet. App. 10a. That venerable maxim simply cannot override the *Moses H. Cone Memorial Hospital* rule, which establishes a "federal substantive law of arbitrability." 460 U.S. at 24. After all, it is black-letter constitutional law that state rules of decision cannot defeat contrary federal rules of decision. See generally *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("[S]ince our decision in *M'Culloch* v. *Maryland*, [17 U.S.] 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is 'without effect.' "); U.S. Const. art VI, cl. 2. In short, the court of appeals' crabbed reading of the arbitration clause is simply without warrant in—and, indeed, in direct conflict with—the precedents of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 18, 1999

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-6496

SECURITY WATCH, INC.,
Plaintiff-Appellant,
v.

SENTINEL SYSTEMS, INC.;
AMERICAN TELEPHONE and TELEGRAPH COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 96-02959—Jerome Turner, District Judge

Argued: March 10, 1999

Decided and Filed: May 11, 1999

Before: JONES, SUHRHEINRICH,
and MOORE, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Security Watch, Inc. ("Security"), a dealer in security systems, brought this action in the Western District of Tennessee against Defendant-Appellee Sentinel Systems, Inc. ("Sentinel"), its distributor, and Defendant-Appellee American Telephone and Telegraph Company ("AT&T"), the manufacturer of the systems. Holding that the Tennessee forum was precluded under the pertinent dealer contracts, the district court dismissed the action. We AFFIRM IN PART and REVERSE IN PART. We conclude that the district court correctly held that a forum-selection provision of the agreements precluded the prosecution of the action in Tennessee against Sentinel, which was a party to the contracts with Security. We hold that the district court erred, however, in concluding that a dispute-resolution provision first included in the parties' 1994 contract was applicable to disputes arising under earlier contracts and precluded the prosecution in Tennessee of all claims against both defendants. Thus, Security will be permitted to proceed against AT&T in the Western District of Tennessee on its pre-1994 claims.

I. FACTS AND PROCEDURAL HISTORY

This commercial dispute involves several parties and several contracts. From at least 1988 through 1994 Security served as a dealer of security systems distributed by Sentinel and manufactured by AT&T. Annual agreements between Security and Sentinel governed the business relationship. AT&T was not a party to these agreements. The 1993 Agreement (and earlier contracts) included a forum-selection provision that confined litigation "involving, arising under, or interpreting" the agreements to certain state or federal courts located in Virginia (the "Forum-Selection Clause"). Joint Appendix ("J.A.") at

52-53 (1993 Agreement ¶ 14). In addition to the Forum-Selection Clause, the 1994 Agreement contained an alternative dispute-resolution provision that required negotiation, mediation, and, in some circumstances, arbitration of disputes (the "ADR Clause").

In 1996 Security sued the defendants in the Western District of Tennessee alleging, inter alia, breach of express and implied warranties.[1] Security alleged that certain products purchased under the dealer contracts were defective. The defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b). The district court granted the motion on two grounds. First, the court held that Security was barred from proceeding against Sentinel in Tennessee by the Forum-Selection Clause of the agreements. Second, the court held that the ADR Clause of the 1994 Agreement was applicable to 1994 and pre-1994 claims against both defendants and also precluded litigation in Tennessee. Security filed a timely notice of appeal. This court's jurisdiction over the appeal is a matter of dispute that we will address before proceeding to the merits.

II. ANALYSIS

A. Appellate Jurisdiction

The defendants argue that under § 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16, this court lacks jurisdiction to hear this appeal. Subject to limited exceptions that are not at issue here, § 16(b) provides that no appeal may be taken from an interlocutory order of the

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[1] Diversity jurisdiction was established pursuant to 28 U.S.C. § 1332. Security is a Tennessee corporation with its principal place of business in that state; Sentinel is a Delaware corporation with its principal place of business in Virginia; and AT&T is a New York corporation with its principal place of business in New Jersey.

district court compelling arbitration or directing arbitration to proceed under the FAA. For two reasons we conclude that § 16 does not divest this court of jurisdiction in this instance.

First, in contrast to the prohibition on appeals of interlocutory orders, § 16(a)(3) permits an appeal to be taken from a final decision with respect to arbitration. This court has held that an order dismissing an action in favor of arbitration is a final order appealable under § 16(a)(3). *See Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275-76 (6th Cir. 1990). The present action was dismissed by the district court.

Second, even if *Arnold* were not controlling, it cannot be said that this action was disposed of in favor of arbitration. To be sure the district court based its dismissal of Security's action, in part, on the preclusion of the Tennessee forum by the ADR Clause of the 1994 Agreement. That provision requires the parties to negotiate any dispute for forty-five days and then to mediate any unresolved matters in New Jersey. If mediation is not successful, the provision requires the parties to enter into binding arbitration in New Jersey if the amount in controversy is less than $1 million. If the amount in controversy exceeds $1 million, the parties may mutually agree to arbitrate or the aggrieved party may sue in New Jersey. *See* J.A. at 78-79 (1994 Agreement ¶ 13). However, the district court did not determine the amount in controversy and thus did not determine whether arbitration would be required under the agreement if preliminary resolution efforts failed. The district court simply dismissed the action, because in any event the agreement precluded litigation in Tennessee.

The defendants have cited no authority for the proposition that the mere possibility that arbitration will be re-

quired under a contractual dispute-resolution process is sufficient to bar an immediate appeal under the FAA. Although it is the policy of the FAA to defer the appeal of an order compelling arbitration, it is not the purpose of that Act, or of any other statute or rule, to defer the appeal of a determination regarding a geographic forum-selection provision. Because it was the geographic forum-selection provision of the ADR Clause rather than the arbitration provision, per se, that provided the grounds for the district court's dismissal of this action, § 16(b) is not applicable to this appeal. Thus, this court has jurisdiction pursuant to 28 U.S.C. § 1291.

B. The Motion to Dismiss

The district court granted the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). The district court held that (1) dismissal of the claims against both defendants was required by the ADR Clause of the 1994 Agreement and (2) dismissal of the claims against Sentinel was dictated by the Forum-Selection Clause included in all of the agreements. We will review the two bases for dismissal sequentially and de novo.[2]

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[2] Neither the parties nor the district court specified the subsection of Fed. R. Civ. P. 12(b) that should govern a motion to dismiss based on contractual forum preclusion, and there is some debate among the circuits as to whether dismissal pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3), or 12(b)(6) is most appropriate. *See Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285, 1289-90 (11th Cir. 1998), *cert. denied*, —— U.S. ——, 119 S. Ct. 851 (1999). We need not resolve this question today, however, as it is settled in this circuit that the enforceability of a forum-selection provision is a matter of law that is reviewed de novo. *See Baker v. LeBoeuf, Lamb, Leiby & MacRae*, 105 F.3d 1102, 1104 (6th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995). De novo review is particularly appropriate as resolution of the questions raised in this appeal turns on the interpretation of the contracts. *See Lipcon*, 148 F.3d at 1290.

1. Dismissal Based on the ADR Clause

The district court held that provisions of the 1994 Agreement required the dismissal of all of Security's claims. On appeal Security does not dispute the dismissal of its claims arising out of the 1994 Agreement. Thus, the specific issue before us is whether the district court erred in holding that the 1994 Agreement was applicable to claims relating to products supplied under earlier contracts.

The district court relied on two clauses of the 1994 Agreement in dismissing pre-1994 claims: ¶ 13, the ADR Clause, and ¶ 19, the merger or integration clause. Paragraph 13 provides that "[t]he parties shall follow these dispute resolution processes in connection with all disputes, controversies or claims . . . arising out of or relating to the Products furnished pursuant to this Agreement or acts or omissions of Distributor or AT&T under this Agreement . . . ." J.A. at 78. The "Agreement" referred to in this paragraph is the 1994 Agreement, and thus this provision plainly refers to disputes related to products delivered under the 1994 Agreement. However, the district court determined that, as a result of ¶ 19, the ADR Clause also governs disputes arising under previous agreements. Paragraph 19, titled "Entire Agreement" provides as follows:

> The terms and conditions contained in this Agreement supersede all prior oral or written understanding[s] between the parties, and constitute the entire agreement between them concerning the subject matter of this Agreement. This Agreement shall not be modified or amended except by a writing signed by the party to be charged.

J.A. at 81.

We conclude that disputes arising under the pre-1994 contracts are not governed by the ADR Clause of the 1994 Agreement. First, it is clear that ¶ 13 alone does not reach disputes relating to products shipped under earlier agreements. Applicable to disputes "arising out of or relating to the Products furnished" under the 1994 Agreement, this ADR provision is very broad in scope and certainly reaches all claims raised by Security with respect to the 1994 Agreement. *See AT&T Corp. v. Vision One Security Sys.*, 914 F. Supp. 392, 397-98 (S.D. Cal. 1995). However, this breadth of scope does not extend over time. Paragraph 12 specifies that the term of the agreement is twelve months, and ¶ 13 does not purport to reach disputes related to pre-1994 agreement products.

Second, it is inappropriate to read the ¶ 19 merger clause as superseding prior annual contracts. Merger clauses are routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated. A completely integrated agreement must be interpreted on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document. *See* 2 Farnsworth on Contracts § 7.3 at 215-25.

Ignoring the universally understood purpose of this boilerplate clause, the district court determined that the "subject matter of this Agreement" referred to in ¶ 19 was the entire relationship between the parties and that the 1993 and prior contracts represented "prior . . . written understanding[s] between the parties" that were superseded by the 1994 contract.[3] The district court fo-

[3] The district court's interpretation would have been more persuasive had the merger clause referred to "prior agreements" or

cused on the fact that the dealer agreements were much more than product orders. Rather, these agreements governed all aspects of a multi-faceted relationship between the parties and contemplated a continuing relationship. Distinguishing *Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 547 A.2d 245, 248 (N.H. 1988), which had held that a similar merger clause was prospective and that the "subject matter" consisted only of products yet to be sold, the district court determined that several of Security's obligations under the 1994 Agreement related to pre-1994 contract sales. For example, Security was required to report unresolved customer complaints.

Although it is true that Security had a number of ongoing reporting and training obligations under the agreements, the contracts here were essentially forward-looking. Each agreement contained monthly performance targets for sales for the coming year. As in *Collectramatic*, the "subject matter" of the 1994 Agreement referred to in ¶ 19 is more properly viewed as the rights and obligations of the parties relating to the 1994 sales program.

The First Circuit has recently addressed the same arguments relating to a similar contract involving AT&T security systems. In an unpublished disposition that court held that an identical "run-of-the-mill integration clause" did not cause a later agreement to supersede prior agreements. *See Choice Security Sys., Inc. v. AT&T Corp.*, No. 97-1774, 1998 WL 153254, at *1 (1st Cir. Feb. 25, 1998) (unpublished). Although the agreements governed the ongoing relationship between the parties, the terms could "be viewed as imposing current responsibilities." *Id.* Thus, as no other provision of the later agree-

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"prior contracts and understandings" rather than to "prior understandings." The latter phrase suggests something less than a formal agreement or contract.

ment even "remotely intimate[d] that the parties ever contemplated so radical a retroactive renegotiation of their earlier agreements," the court held that an arbitration provision that first appeared in a 1994 agreement did not apply to disputes relating to pre-1994 products. *Id.*

The conclusion that the 1994 ADR Clause is inapplicable to disputes arising under earlier contracts also is supported by *In re Hops Antitrust Litig.*, 655 F. Supp. 169 (E.D. Mo.), *appeal dismissed*, 832 F.2d 470 (8th Cir. 1987). The defendants there also argued that an arbitration clause in a later agreement was applicable to disputes arising under earlier agreements that lacked the clause. The court disagreed noting that each contract was distinct and, significantly, that "[t]he record reflects no agreement by the parties to amend earlier contracts to provide for arbitration of disputes." *Id.* at 172-73. The court did not indicate whether the contract containing the arbitration provision in *Hops* included an integration clause.

We find the logic of *Choice Security Systems* and *In re Hops Antitrust Litigation* persuasive, and the defendants offer no compelling arguments or authority in support of the contrary view. The defendants argue that it would be nonsensical for the parties to commit disputes arising under the 1994 Agreement to arbitration while permitting disputes arising under the earlier agreements to be litigated. But it is equally nonsensical to suggest that Security simply would abandon its established right to litigate disputes arising under the pre-1994 contracts.

The defendants also cite a number of cases in which an arbitration clause in an "umbrella contract" has been held applicable to supplemental contracts that lacked the clause. *See S.A. Mineracao da Trinidade-Samitri v. Utah Int'l Inc.*, 576 F. Supp. 566, 573 (S.D.N.Y.), *amended*

by 579 F. Supp. 1049 (S.D.N.Y.), *and aff'd*, 745 F.2d 190 (2d Cir. 1984); *Consumer Concepts, Inc. v. Mego Corp.*, 458 F. Supp. 543, 545 (S.D.N.Y. 1978). In these cases, however, disputes arising under the later supplemental contracts were held to be subsumed within the set of disputes that could arise under the umbrella contracts. Given the fact that the arbitration provision in the present case arises in a later contract, much more is needed to infer an intention to apply the provision to previous contracts. *See In re Hops Antitrust Litig.*, 655 F. Supp. at 172-73 (holding that the umbrella/supplemental contract analogy was inapplicable in a case in which an arbitration provision was inserted in a later contract).

Finally, the defendants argue that doubts concerning the scope of arbitrability must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Given the fact that the ambiguity rests in the merger provision rather than the arbitration provision, however, we also must consider the maxim that contract ambiguities are to be construed against the drafter, in this case the defendants. The latter maxim is particularly apt here, as the defendants attempt to reinterpret a standard boilerplate integration provision in order to supersede previous contracts and extend the 1994 ADR Clause to previous time periods. Had the parties intended to apply the new ADR processes to disputes arising under the previous contracts, we believe they would have done so explicitly.[4]

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[4] Pursuant to Federal Rule of Appellate Procedure 28(j) the defendants call this court's attention to a recent case out of the Fourth Circuit, *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998). There, the court held that an arbitration clause in a contract relating to one Hallmark store operated by the plaintiff was applicable to a dispute relating to the plaintiff's second Hallmark store. *See id.* at 569-71. The arbitration clause there, however, was written to govern any dispute "relating to . . . *any*

2. Dismissal Based on the Forum-Selection Clause

Having determined that the district court erred in concluding that disputes arising under the 1993 Agreement and earlier contracts are governed by the ADR Clause of the 1994 Agreement, we turn to the district court's alternative basis for granting the motion to dismiss with respect to Sentinel, i.e., the court's holding that the Forum-Selection Clause of the contracts precluded the prosecution of Security's suit against Sentinel in Tennessee. On this point we are in agreement with the district court.

Paragraph 14 of the 1993 Agreement provides in pertinent part as follows:

> The parties hereby agree that this contract has been made in the Commonwealth of Virginia and that the Circuit Court for the City of Hampton, Virginia, or the United States District Court for the Eastern Distract of Virginia, Newport News Division, shall be the exclusive forums in which any action in any way involving, arising under, or interpreting this Agreement shall be brought. The parties hereto expressly consent to jurisdiction of those courts over them and agree to the appropriateness of the venue of the courts designated herein.

J.A. at 52-53.[5] Security argues that this clause is unenforceable. We disagree.

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aspects of the relationship between Hallmark and Retailer," i.e., the plaintiff. *See id.* at 568 (emphasis in original). Because the arbitration clause in the present case cannot be read to extend to the "relationship" between the parties, *Cara's Notions* is inapposite.

[5] Paragraph 16 of the 1994 Agreement is identical. *See* J.A. at 79-80. Apparently, the pre-1993 contracts included the same provision.

Although formerly disfavored, forum-selection clauses generally are enforced by modern courts unless enforcement is shown to be unfair or unreasonable. *See* Restatement (Second) of Conflict of Laws § 80 (1988 Revision) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."); *see also Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir.), *cert. denied*, 502 U.S. 821 (1991).

At least with respect to federal courts sitting in admiralty jurisdiction, the Supreme Court settled the forum-selection clause enforceability question in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). There, the Court held that forum-selection "clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10. Although several other circuits have held that the rule of *Zapata* is applicable to diversity cases,[6] this court has not decided whether a federal court sitting in diversity jurisdiction evaluates the enforceability of a forum-selection clause under the rule of *Zapata* or under the applicable state rule.[7] We need not resolve that matter here, however, as Tennessee law is consistent with the rule of *Zapata*. *See Dyersburg Mach. Works, Inc., v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983) (courts of Tennessee "should enforce [a forum-selection] clause unless the party opposing enforcement

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[6] *See Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509 n.10 (2d Cir. 1998); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995); *International Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 115 (5th Cir. 1996) (following the Second and Ninth Circuits in adopting the *Zapata* rule for diversity cases, but noting that the Fourth Circuit looks to state law).

[7] *See Baker*, 105 F.3d at 1105 (declining to resolve the issue as state and federal law were aligned).

demonstrates that it would be unfair and inequitable to do so").

The Restatement discusses three situations in which a court might conclude that a forum-selection clause was unenforceable. The provision may be unenforceable if (1) it was "obtained by fraud, duress, the abuse of economic power or other unconscionable means," (2) the designated forum "would be closed to the suit or would not handle it effectively or fairly," or (3) the designated forum "would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust." Restatement § 80 cmt. c. Security has not suggested that the Virginia forum would be unavailable or would be seriously inconvenient. Rather, Security argues that the circumstances of contract formation were so unfair as to render the provision unenforceable.

Essentially, Security asserts that the dealer agreements are adhesion contracts. Security alleges that it did not freely agree to the forum-selection provision and that the clause was not negotiable. However, Security offers no evidence that the contract terms were non-negotiable or that the manufacturer or distributor possessed inordinate bargaining power. These agreements were negotiated between sophisticated business entities. In the absence of any evidence of overreaching on the part of the defendants, the district court was fully justified in determining that the Forum-Selection Clause was enforceable between Sentinel and Security.[8]

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[8] Security complains that AT&T insulated itself from the agreements, but that claim has no bearing on the determination that Security is precluded from proceeding against Sentinel in Tennessee. Security also notes the conflict in the 1994 Agreement between the Forum-Selection Clause and the forum provisions contained within the ADR Clause. There is no conflict as to the 1993 Agreement, however, and, because Security does not contest the district court's

Although the district court concluded that the Forum-Selection Clause precluded Security from proceeding against Sentinel in Tennessee, the court specifically determined that this clause provided "no contractual basis to compel Security to file its claim against AT&T in Virginia." J.A. at 248 (Order at 2). In their submissions to the district court, the defendants asserted that AT&T was a third-party beneficiary of the dealer agreements and at least implied that the Forum-Selection Clause was applicable to Security's claims against AT&T. On appeal Security argues that as a non-party to the agreements AT&T has no right to invoke the Forum-Selection Clause of the agreements. The defendants did not address this point in their appellate brief, and we consider the issue to be abandoned by the defendants. *See Enertech Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 259 (6th Cir. 1996); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

III. CONCLUSION

For the foregoing reasons we VACATE the district court's order dismissing Security's action against AT&T on claims relating to pre-1994 dealer contracts but AFFIRM the order with respect to the dismissal of all claims against Sentinel.

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determination that the ADR Clause of the 1994 Agreement precludes the Tennessee action against both defendants with respect to 1994 claims, this court need not address the potential conflict in the 1994 Agreement.

APPENDIX B

[Filed Oct. 27, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 96-2959-TUBRE

SECURITY WATCH, INC.,
Plaintiff,

v.

SENTINEL SYSTEMS, INCORPORATED and
AMERICAN TELEPHONE & TELEGRAPH, INC.,
Defendants.

ORDER ON MOTION TO DISMISS COMPLAINT

Plaintiff Security Watch, Inc. ("Security Watch") filed suit against Sentinel Systems, Incorporated ("Sentinel") and American Telephone & Telegraph, Inc. ("AT&T") alleging numerous claims which arise under Security's annual dealership contracts with Sentinel, which is a distributor of AT&T's security systems. The defendants filed a joint motion to dismiss under Federal Rule of Civil Procedure 12(b) asserting that (1) the dealership contracts contain choice of law forum provisions which provide that the Circuit Court for the City of Hampton, Virginia or the United States District Court for the Eastern District of Virginia, Newport News Division, are the exclusive forums in which Security's suit may be brought; and (2) that the 1994 dealership contract, which super-

sedes all prior contracts between the parties, requires these disputes to be submitted to arbitration.

Both the 1993 and 1994 dealership contracts, as well as earlier annual versions between Security and Sentinel, contain the following choice of forum provisions:

> The parties hereby agree that this contract has been made in the Commonwealth of Virginia and that the Circuit Court for the City of Hampton, Virginia, or the United States District Court for the Eastern District of Virginia, Newport News Division, shall be the exclusive forums in which any action in any way involving, arising under, or interpreting this Agreement shall be brought. The parties hereto expressly consent to jurisdiction of those courts over them and agree to the appropriateness of the venue of the courts designated herein. In addition, the parties agree that this Agreement, and performance hereunder, have a substantial connection with the Commonwealth of Virginia and accordingly agree that the substantive law (and not the conflicts of law principles of the Commonwealth of Virginia[)] shall apply to any disputes relating to this Agreement or arising in any way hereunder. The choice of law principles of the Commonwealth of Virginia shall not be utilized to cause the law of another jurisdiction to apply. Notwithstanding any provision to the contrary in this Agreement, the provisions of this Paragraph 14 [sic] shall survive the termination of this Agreement.

(Mot. to Dismiss Compl., Ex. A at 2-13).

This clause is clear and unambiguous and is controlling between the parties to the contract, Security and

Sentinel.[1] At the same time, however, there is no contractual basis to compel Security to file its claim against AT&T in Virginia.

The second argument advanced by defendants in support of their motion to dismiss is that the 1994 dealership contract requires that disputes between Security, Sentinel and AT&T be arbitrated. The agreement provides:

> The parties shall follow these dispute resolution processes in connection with all disputes, controversies or claims, whether based on contract, tort, statute, fraud, misrepresentation or any other legal theory (hereinafter collectively "Disputes"), except as otherwise noted, arising out of or relating to the Products furnished pursuant to this Agreement or acts or omissions of Distributor or AT&T under this Agreement:
>
> 13.1 The parties will attempt to settle all Disputes through good faith negotiations between them, and, in the event of [D]isputes with AT&T, among them and AT&T. If those attempts fail to resolve the Dispute within forty-five (45) days of the date of initial demand for negotiation, then the involved parties (including AT&T if applicable) shall try in good faith to settle the Dispute by mediation conducted in New Jersey under the Commercial Mediation Rules of the American Arbitration Association ("AAA"). Each party shall bear its own expenses; the parties shall equally share the filing and other administrative fees of the AAA and

[1] The defendants seek dismissal in this forum, rather than a transfer, and at oral argument on this motion agree that they would agree to toll the statute of limitations upon dismissal in order to allow refiling in the appropriate court.

the expenses of the mediator. The parties shall be represented in the mediation by representatives having final settlement authority over the matter in dispute.

13.2 Thereafter, any remaining Disputes not finally resolved at the mediation level, where the amount in controversy does not exceed $1M, shall be settled by binding arbitration conducted in New Jersey in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Selection of one neutral arbitrator by the parties (including AT&T if applicable) shall be from the AAA Panel list in accordance with the appointment Rules of the AAA. AT&T shall be a party to the arbitration. Each party shall bear its own expenses; the parties shall equally share the filing and other administrative fees of the AAA and the expenses of the arbitrator. Any award the arbitrator [sic] shall be in writing, shall state the reasons for the award (including any findings of fact and conclusions of law) and shall explain the breakout of any damages awarded. Judgement upon an award may be entered in any Court having competent jurisdiction. The arbitrator shall not have the power to award damages in excess of actual damages, such as punitive damages and damages excluded under the LIMITATION OF LIABILITY Section of the Agreement. The Federal Arbitration Act, 9 U.S.C. Sections 1 to 14, shall govern the interpretation and enforcement [of] this Section.

> With respect to any remaining Disputes where the amount in controversy exceeds $1M, the parties (and AT&T if applicable) may mutually agree in writing to submit to arbitration in accordance with this Section or the aggrieved party may commence an action in a court of competent jurisdiction in New Jersey.

Id. at 11-12.

In response, Security argues that its claims related to the 1993 dealership contract between it and Sentinel are not subject to arbitration because the pre-1994 dealership contracts did not require arbitration. Defendants, however, contend that the 1994 dealership contract arbitration provisions do compel arbitration even as to 1993 and earlier claims because the 1994 contract supersedes all prior dealership contracts. Defendants rely on Section 19 of the 1994 contract, which reads as follows:

> The terms and conditions contained in this Agreement supersede all prior oral or written understanding [sic] between the parties, and constitute the entire agreement between them concerning the subject matter of this Agreement. This Agreement shall not be modified or amended except by a writing signed by the party to be charged.

Id. at 14. They contend that the disputes in this lawsuit related to "the subject matter of this Agreement" and therefore are subject to the dispute resolution requirements of Section 13. Defendants, although finding no law dealing with similar facts, rely on a number of cases which have held that disputes arising out of subsequent agreements must be arbitrated when earlier "umbrella" agreements between the parties require arbitration and are so related to the agreement in dispute that it is clear that the parties intended to be covered by the arbitration

clause. *S.A. Mineracao Da Tindade-Samitri v. Utah International, Inc.*, 576 F. Supp. 566, 572-73 (S.D.N.Y. 1983), *aff'd* 745 F.2d 190 (2d Cir. 1983); *Consumer Concepts, Inc. v. Mego Corp.*, 458 F. Supp. 543 (S.D.N.Y. 1978); *Mississippi Phosphates Corp. v. Unitramp, Ltd.*, Civ. Action No. 5:95cv49-Br-N (S.D. Miss. January 16, 1996).

On the other hand, *In re Hops Antitrust Litigation*, 655 F. Supp. 169 (E.D. Mo.), *appeal dismissed* 832 F.2d 470 (8th Cir. 1987), held that plaintiffs, who sold hops to defendant by separate contracts each year, were entitled to litigate their antitrust claims relative to contracts that preceded the parties' use of arbitration clauses in later 1982 contracts and were not bound by the later contracts to arbitrate the claims pertaining to pre-1982 contracts. In *In re Hops*, the arbitration clause covered "any dispute arising out of or relating to this agreement . . . ." Plaintiffs were alleging antitrust violations from 1976 until 1984. The court held that each contract encompassed discreet transactions between the parties for the purchase and sale of hops and that disputes under earlier contracts without arbitration clauses were not covered by the arbitration provisions in the later contracts. Here, Security argues that each of its annual contracts were distinct contracts related prospectively to the future dealings of the parties and not broadly to the overall distributor-dealer relationship.

Security also cites *Kentucky Fried Chicken v. Collectramatic, Inc.*, 547 A.2d 245 (N.H. 1988), an indemnity lawsuit which held that the "subject matter" of the contract related to designated items yet to be sold, not similar items sold in the past under prior agreements.

Finally, Security relies on the unpublished order of United States District Judge Edward F. Harrington of the

District of Massachusetts in *Choice Security Systems, Inc. v. AT&T*, wherein the court stayed for arbitration only the disputes which related to the contracts containing arbitration clauses. The order, however, merely states the result, not the reasoning. Moreover, it is not clear what contract terms were involved, nor whether the contract contained a supersedure clause such as Section 19 of the 1994 contract here in question.

The contracts between Security and Sentinel in this case go far beyond documenting discrete annual sales; they establish in great detail a distributor-dealer relationship; they address how the dealer conducts its business and trains its employees; they require the dealer to utilize AT&T manuals, instructions and procedures and to follow identified ethics; they contemplate a continuing relationship from year to year and provide for automatic renewal of the contracts. The contracts have indemnity provisions and confidentiality restrictions.

It is in this contractual environment that the court must determine what the parties intended by the language of Section 19 of the 1994 agreement when they provided that the terms of that contract superseded all written understandings between the parties "concerning the subject matter of this Agreement." It is clear that the subject matter of this agreement extends well beyond discrete sales and encompasses the entire distributor-dealer relationship. It not only envisions future sales, but such matters as might involve pre-contractual sales: Security must notify Sentinel of safety problems or product defects; Security must not delegate obligations owed to customers; Security must use quality standards on service and maintenance; Security shall report customer complaints which are not resolved.

The "subject matter of the Agreement," as to which the 1994 agreement supersedes all prior oral or written

understandings, is the relationship of the dealer, Security, to the distributor, Sentinel. The pre-1994 contracts between those two parties, being written understandings, are superseded by the terms of the 1994 contract, and its requirements that the parties follow certain enumerated dispute resolution processes, including certain arbitration provisions.

Security argues, however, that this dispute involves an amount in excess of $1,000,000 and thus is not subject to arbitration under the agreement, but can be the subject of a suit in New Jersey instead. Although the complaint in this case does not seek an enumerated amount of damages, the issue of the amount involved is not properly one for this court to determine; that issue is one to be addressed by the arbitrator or New Jersey courts if and when Security seeks to resolve these disputes pursuant to Section 13 of the agreement.[2]

The defendants' motion to dismiss is therefore granted on the grounds that (1) the choice of forum clause precludes suit against Sentinel in this district; (2) the dispute resolution processes of the 1994 contract require the parties to either arbitrate their disputes or file suit in New Jersey. Since this forum is precluded by the parties' contract in any case, the court dismisses, rather than stays, the action.[3]

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[2] In *AT&T Corp. v. Vision One Security Systems*, 914 F. Supp. 392, 298 [sic] (S.D. Cal. 1995), the court interpreted this same contractual language to mean that the issue of the size of the claim was itself arbitrable.

[3] Security also argues that it was fraudulently induced to enter into the disputed contract and that the fraud claim is not subject to arbitration under Tennessee law. Tennessee law is not controlling. This contract between Security and Sentinel involves commerce and is governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S.

IT IS SO ORDERED this 27th day of October, 1997.

/s/ Jerome Turner
JEROME TURNER
United States District Judge

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395 (1967), the Supreme Court made clear that unless the claim is that the arbitration clause itself was induced by fraud, then the court must decide that issue, not the arbitrators; otherwise, fraud in the inducement claims are covered by an arbitration clause. Here there is no assertion that the arbitration clause was induced by fraud.

APPENDIX C

[Filed Jul. 22, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-6496

SECURITY WATCH, INC.,
Plaintiff-Appellant,

v.

SENTINEL SYSTEMS, INC., *et al.*,
Defendants-Appellees.

BEFORE: JONES, SUHRHEINRICH, and MOORE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk